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FILED
Date: March 5, 2015
1:55 o'clock P.M.
Donna McQuality, Clerk
By: Becky Hamilton
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

GEORGE HANCE, et al,

Plaintiff,

-vs-

WALES ARNOLD, et ux., et al.,

Defendants,

In the matter of VERDE DITCH COMPANY,

Case No. : P1300CV4772

Date: March 5, 2015

Upon direction of the Court, the Objection of the Yavapai Apache Nation is filed this date. Copies of the Nation's Objection are provided to the parties in court.

YAVAPAI-APACHE NATION

Executive Office

Chairman Beauty ~ Vice-Chairwoman Rubio

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2400 W. Datsi Street, Camp Verde, AZ 86322

February 17, 2015

Honorable Judge David L. Mackey
Master of the Verde Ditch
YAVAPAI COUNTY SUPERIOR COURT
120 S. Cortez
Prescott, Arizona 86303

Re: Hance v. Arnold, Case No. P1300CV4772 - Yavapai-Apache Nation's Comments and Objections to the Proposed Memorandum of Understanding with the Salt River Project

Dear Hon. Judge Mackey:

As Chairman of the Yavapai-Apache Nation ("Nation"), I am writing this letter to you in your capacity as Master of the Verde Ditch under the *Hance v. Arnold* Judgment and Decree entered on March 23, 1909 ("Decree"), which established the relative ownership of the right to the use of the waters flowing through the Verde Ditch among the parties to the Decree.

By providing this letter to you, the Nation is not waiving its sovereign immunity from suit or seeking to make an appearance in the *Hance v. Arnold* case, but rather, we hope to inform you as the Ditch Master, of the Nation's concerns related to the Memorandum of Understanding ("MOU") being proposed for your consideration and approval by the Verde Ditch Commissioners and the Salt River Project ("SRP") (an apparant non-party and non-shareholder under the Decree).

The Nation fully supports the goal of clarifying the specific rights of the various shareholders to use water from the Verde Ditch, which is wholly within the Court's original and continuing jurisdiction under the *Hance v. Arnold* Decree. Resolving such matters provides certainty to the shareholders and confirms that they have rights to the delivery of water from the Ditch for use on certain lands. However, what is being proposed by SRP and the Verde Ditch Company ("VDC") in the MOU, goes far beyond this goal and, as discussed in greater detail below, is beyond the Court's jurisdiction and should not be approved by the Court.

For clarification purposes, you should be aware that the United States of America ("US") is the actual "shareholder" of the Nation's ditch rights under the *Hance v. Arnold* Decree, while the Nation holds the beneficial interest to these ditch rights, which are held in trust for the Nation by the United States. *See, e.g., White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 921-922

(9th Cir. Ariz. 1986); *see also Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 470-71 (9th Cir. 1975).[1]

The United States also holds title to the lands of the Yavapai-Apache Reservation ("Reservation") in trust for the Yavapai-Apache Nation, including those lands that the United States' acquired for the benefit of the Nation from James and Hattie Wingfield on November 1, 1909. James Wingfield was one of the original parties to the *Hance v. Arnold* Decree.

Like other shareholders on the Ditch, the Nation relies upon the Verde Ditch to provide a critical water supply to the Nation's Reservation lands located in Camp Verde. The shareholders' rights in the Verde Ditch, including the US' shares for the Nation, are vested property rights that cannot be taken or adversely impacted without due process of law. *See, e.g., San Carlos Apache Tribe v. Superior Court,* 193 Ariz. 195, 205, 972 P.2d 179, 189 (1999); *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source,* 171 Ariz. 230, 235-236, 830 P.2d 442 (1992) (*Gila I*) ("Consequently, holders of water rights are constitutionally entitled to due process in any adjudication that could deprive them of those rights.").

While the Nation has had a limited opportunity to review the MOU and related filings that are presently before the Court, these filings give rise to numerous concerns which include, but are not limited to: (a) the failure to properly serve the US as the record title holder to the Nation's ditch rights; (b) the limited timeframe provided to the shareholders to review the MOU and related filings despite their potential impact on the vested property rights of all of the shareholders under the Ditch; (c) the participation of SRP as a non-party and non-shareholder under the Decree; (d) the exclusion of the Nation, and the US on its behalf, from the MOU and the negotiation process; (e) the potential to unlawfully modify the *Hance v. Arnold* Decree to include terms and requirements outside this Court's limited subject matter jurisdiction; (d) the MOU's potential to adversely impact shareholders' vested rights in the ongoing general stream adjudication proceeding, *In Re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, Maricopa County Superior Court (W1-4) ("Gila River Adjudication") and under applicable law; (f) the failure to provide an open and transparent process that includes a full accounting of the data collection and analysis that was conducted by the Verde Ditch Commissioners using funds generated under the Special Assessment first imposed on all shareholders in 2005; and (g) the need for the Court to exercise its own jurisdiction and authority within the four-corners of the Decree to clarify and the rights of all shareholders under the Decree.

Accordingly, through this letter, as discussed in detail below, the Nation is requesting that the Court/Ditch Master order the following:

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[1] Unlike other shareholders in the Verde Ditch, the rights of the United States to the Verde Ditch (which are held in trust by the United States for the Nation) are also governed by and protected under principles of federal law. *See, e.g., United States v. Superior Court*, 144 Ariz. 265, 277 697 P.2d 658, 670 (1985). Nothing in this letter shall be construed to waive the Nation's right to assert or protect its federal reserved water rights or other trust assets of the Nation or the United States under applicable law.

1. That approval of the proposed MOU be denied without further objections being required.

2. Or, alternatively, that additional time be granted to all shareholders, including the United States on behalf of the Nation, to file comments and objections to the proposed MOU.

3. That the VDC make available all information and data collected, analyzed, and compiled using the Special Assessment funds to all the shareholders for their review.

4. That the VDC provide a detailed written report to the shareholders explaining how the Special Assessment funds were spent.

5. That the VDC provide the shareholders with a written report documenting the VDC information (if any) that has been shared with SRP.

6. That the Court implement its own process involving all shareholders to clarify which lands the Verde Ditch may serve pursuant to the *Hance v. Arnold* Decree and to ultimately issue a clarification of the *Hance v. Arnold* Decree which describes these lands and the proportional interests of the shareholders.

I. LACK OF SERVICE OF NOTICE ON UNITED STATES AS SHAREHOLDER

The US, as the owner of the Nation's shares in the Verde Ditch, was not properly served with notice of MOU and the other filings in this proceeding. Because water rights are vested property rights, due process requires that notice be given where the vested property rights of other users may be impacted. Such notice must be "reasonably calculated under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections or claims." *Gila I*, 171 Ariz. at 235-236 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (internal quotation marks omitted)).

In addition, neither the US nor the Nation was consulted in any way prior to the filing of the MOU with the Court. This is improper. The Court's December 4, 2014, Order, ¶ 6, required the following:

> The Verde Ditch shall provide notice to all Shareholders as follows:
>
> a. A copy of the Petition and Order, along with a copy of the MOU or a Court approved summary of the MOU, shall be served by first class mail, postage prepaid to every Shareholder of the Verde Ditch at the last known address of the Shareholder on file at the Verde Ditch office… [Emphasis added].

The Yavapai-Apache Nation received written notice by letter dated December 19, 2014,[2] from the Verde Ditch Company regarding the Ditch Company's proposal to enter into the MOU with SRP, along with the Court's December 4, 2014 Order for considering approval of the MOU and hearing objections. After reviewing the filings and attending the Special Meeting of the Verde Ditch Company on January 24, 2015, to obtain more information, the Nation notified the Regional Director for the U.S. Bureau of Indian Affairs ("BIA") of the proceedings on January 29, 2015, and discovered that the Verde Ditch Company did not provide notice of the proposed MOU to the BIA as the record shareholder on the Ditch. This was despite the fact that for many years, the US paid the Verde Ditch assessments that were sent to the BIA's Truxton Canon Agency from the Verde Ditch Company. This was improper. *See, e.g., Taylor v. Tempe Irrigation Canal Co.*, 21 Ariz. 574, 582, 193 P. 12 (1920) (holding that for confirmation or enforcement of a prior decree, all users of water under a canal company should be served with notice and permitted to appear because it is "apparent that all such [users] are vitally interested" in the outcome.).

While the Nation has informed the BIA on behalf of the US of the proposed MOU and of its concerns related to the MOU, the BIA, as a federal agency, is required to follow certain procedures in order to obtain the involvement of a Solicitor and/or a Department of Justice ("DOJ") attorney in this matter. The Nation understands that the US is appointing a legal representative to this case for the United States, but given the formal process that is required for the US to take action in this matter, the Nation is concerned that there is simply not enough time for the US to review the MOU and related filings and take full and necessary action to protect its vested property rights in the Ditch on behalf of the Nation.

For this reason, the Nation respectfully requests that the Court extend the time allowed for filing objections to the proposed MOU for a reasonable period of time that would allow the United States, as shareholder, the opportunity to file full and complete comments and objections to the proposed MOU as the trustee for the Nation.

II. THE NATION AGREES WITH OTHER SHAREHOLDERS THAT THE TIMEFRAME FOR FILING OBJECTIONS IS TOO SHORT AND THAT MORE INFORMATION SHOULD BE SHARED WITH THE SHAREHOLDERS PRIOR TO REQUIRING SHAREHOLDERS TO FILE OBJECTIONS TO THE PROPOSED MOU

[2] The Nation's Attorney General's Office actually received the VDC's letter on January 6, 2015 after the Nation's offices re-opened from being closed for two weeks during the holiday break. Prior to that, on December 3, 2014, the Nation's Water Rights Counsel, Ms. Robyn Interpreter, emailed Mr. Rick Mabery to request that he send her information pertaining to the Court hearing being held on December 4 to obtain more information. On December 4, 2014, Mr. Mabery emailed Ms. Interpreter copies of the Application for Consideration, Notice of Hearing for Consideration of Application and Petition for Approval of MOU. Mr. Mabery gave no indication that any action had been taken by the Court at that time and it was not until January 6, 2015, that the Nation's Water Rights Counsel received notice from the Nation's Attorney General's Office that the December 19, 2015 had been sent to the Nation and that the Court had initiated a process and hearing schedule regarding consideration for approval of the MOU.

Like many other shareholders, two of the Nation's representatives attended the Special Meeting of the Verde Ditch Company on January 24, 2015, to obtain more information regarding the proposed MOU. Several of the shareholders expressed concern at the meeting that the time frame for allowing objections until February 17, 2015 (only 63 days from the date of the Verde Ditch Company letter to the Shareholders) is much too short, particularly given its impact on the vested water rights of the shareholders.[3]

Several of the shareholders also expressed concern that they were being required to file objections to the MOU before they would know whether or not the MOU defined their lands as "Green Lands", "Purple Lands" or "Orange Lands", since the map provided in the December 19, 2014 letter was merely an overview map that lacked sufficient detail to identify individual lands. Without knowing how their particular lands are situated, several shareholders also expressed concern that they lacked sufficient information to even make an informed decision regarding whether or not they should choose to file an objection to the MOU.[4] The Nation agrees with these due process concerns expressed by the shareholders.

If the Court does not reject the MOU outright, the Nation respectfully requests that the Verde Ditch Company be required to promptly make available to each shareholder all of the information it has relied upon in conjunction with SRP to classify the lands under the proposed MOU and thereafter, re-set the date for filing objections to the proposed MOU for a reasonable amount of time for the shareholders to file objections to the proposed MOU.

III. THE MOU PROPOSES TO EXCLUDE THE NATION BUT STILL HAS THE POTENTIAL TO IMPACT THE DITCH RIGHTS HELD BY THE UNITED STATES IN TRUST FOR THE NATION

From the Nation's limited opportunity to review the MOU, it appears that it would set in motion a process whereby the Court will ultimately be asked to modify the *Hance v. Arnold* Decree without the full participation of all of the shareholders on the Ditch who are parties to the Decree, including the United States for the Nation. This is improper.

The MOU expressly excludes the Nation from the MOU process. *See* MOU at p. 6, ¶ 5.2.01 ("The designation of the Verde Ditch HWU Lands by the Parties does not include any lands or uses claimed by the Yavapai Apache Camp Verde Nation,[5] and the exclusion of those

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[3] The VDC and SRP relayed to the shareholders at the January 24, 2015 Special Meeting that the MOU had been worked on for 6-7 years prior to being proposed. Allowing only 63 days for the shareholders to respond to something that has taken this long to prepare fails to comport with due process.

[4] Additionally, there are over 500 shareholders on the Ditch. Those shareholders should be afforded a reasonable opportunity to retain legal counsel to assist them in addressing the complex matter of the MOU which they are being asked to consider.

[5] The MOU incorrectly identifies the Nation and does not properly designate the United States, the actual shareholder, as being excluded from the MOU. The legal name of the Nation is the "Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona" as published annually in the Federal Register.

lands is not intended to imply the existence of Historic Water Use or lack thereof on those lands."). Importantly, the MOU (whether intentionally or inadvertently) does not expressly exclude the US as the actual shareholder of the ditch rights.

The VDC and SRP did not include the Nation or the United States in the negotiation and development of the MOU, including with regard to their decision to expressly exclude the Nation from the MOU process. Even so, it is important to understand that due to the way in which the Decree allocates shares in the Verde Ditch, the process prescribed by the MOU would ultimately result in a determination of all remaining shareholders' rights to the Verde Ditch, including the shares owned by the US for the Nation. This is because all of the shareholders' rights in the Ditch are *inter sese* (meaning, each shareholder's right to use the Ditch is dependent on and affected by everyone else's right to use the Ditch). Thus, any determination made regarding the scope and extent of one shareholder's fractionalized interests has the potential to impact the remaining shareholders' interests in the Ditch, including the US for the Nation. *See, e.g., Taylor*, 21 Ariz. at 582.

To this end, any process contemplated by the Court that would modify the Decree and thereby impact vested property rights must ensure that (1) all shareholders understand that the Court will be modifying the Decree to make clear which lands are entitled to water service from the Verde Ditch and reconcile the shareholders' interests in the Ditch, and (2) that all shareholders have a full and fair opportunity to review and object to the evidence of any other shareholder's purported rights in a process designed to provide due process to all shareholders under the Decree. This includes the United States on behalf of Nation. The MOU, as written, fails to meet this test.[6]

IV. THE COURT LACKS JURISDICTION TO APPROVE THE MOU BETWEEN THE VERDE DITCH COMMISSIONERS AND SRP AND TO MODIFY THE *HANCE V. ARNOLD* DECREE AS PROPOSED HERE

The MOU appears to have been developed and driven by SRP, presumably in consultation with the Verde Ditch Commissioners.[7] However, from the information reviewed by the Nation, SRP is neither a party to nor a shareholder under the *Hance v. Arnold* Decree. Furthermore, the Verde Ditch Commissioners, who are officers of the Court charged with representing the interests of all shareholders to the Ditch and managing and enforcing the terms

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E.g. see 79 FR 4748, 4752 (January 29, 2014). Given the potential impact of the MOU and any related process on the US' ditch rights, any reference to the Nation or the US on its behalf must be accurate.

[6] As discussed in greater detail later in this letter, *infra.*, it is the Nation's position that the Court lacks jurisdiction to modify the Decree in the manner proposed in the MOU and further, that the Court need not modify the Decree where it merely seeks to enforce the terms of the Decree by determining the current, legal successors in interest to the original parties to the Decree and the lands to which the Ditch rights are properly attached.

[7] The Verde Ditch Commissioners are also shareholders under the Verde Ditch.

of the Decree,[8] do not have the authority to enter into an agreement with SRP in the first instance, as such an agreement (as discussed in greater detail below) would be beyond the bounds of the Court's original and continuing jurisdiction under the *Hance v. Arnold* Decree.[9]

If the MOU is approved by the Court, it will set in motion a process that will impact the rights of every single shareholder to the Ditch, regardless of whether they choose to enter into an Historic Water Right (HWR) Agreement with SRP or not. This is because each of the shareholder's right to the use of water from the Verde Ditch will ultimately be determined when the VDC and SRP submit a "Final Settlement Agreement" for approval to the Court. Under this current scheme, the Final Settlement Agreement would, in turn, modify the Decree to reflect the view of each individual shareholder's rights by SRP and the Verde Ditch Commissioners. And ultimately, the VDC has agreed (presumably as officers of the Court and on behalf of the shareholders) that at the conclusion of the process, the VDC will be required to refuse delivery of water to those shareholders who are not delineated on the maps as having "Green Lands" or who have otherwise not obtained a valid severance and transfer for their "Orange Lands" pursuant to the MOU and applicable Arizona law.[10] *See* MOU at p. 12, ¶ 12.4 ("The Final Settlement Agreement shall provide that the VDC will not undertake any actions to permit or allow water from the Verde Ditch to serve any lands that do not have Historic Water Use as set forth pursuant to this MOU and approved by the *Hance v. Arnold* Court. The lack of an HWU Agreement for any particular parcel of land shall not preclude VDC from serving such parcel, so long as the parcel is designated as having Historic Water Use by this MOU or by an Order of the *Hance v. Arnold* Court entered pursuant to this MOU.").

All shareholders should be given clear notice that the MOU is not merely a proposal to engage in a settlement process in which some shareholders may choose to "opt out" by not signing an HWR Agreement with SRP. Rather, it should be made clear that the MOU would prescribe a process for the wholesale modification of the *Hance v. Arnold* Decree and every shareholder (except perhaps the Nation as to those rights) would be bound by determinations made as part of the MOU process.

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[8] *See* Order Promulgating New Rules and Regulations for the Operation of the Verde Ditch dated August 9, 1989 at p. 2, lines 15-18 ("Each commissioner shall be an officer of the court and shall serve at the pleasure of the court for a staggered term as determined by the court."). The Rules and Regulations clearly prescribe authorities of the Commissioners to act as officers of the Court (e.g. authority to approve headgates as to type, location and size; authority to seal off a shareholder's headgate; authority to deny a shareholder the usage of Verde Ditch water). *Id.*

[9] From the information available to the Nation, it does not appear that the Verde Ditch Commissioners have invoked a vote of the Shareholders to decide on whether the MOU should be approved in accordance with the provisions of the Rules and Regulations of the Verde Ditch approved by the Court on August 9, 1989. *See id.* at p. 5-6, ¶ 11 (...At the annual meeting, ditch matters may be referred to the shareholders for decision. Shareholders shall be entitled to vote on the basis of their valid shares in the Verde Ditch...Any matter referred to the shareholders for voting shall require at least fifty-one percent approval of the shares entitled to vote (either in person or by proxy) at the meeting.").

[10] The final treatment of "Purple Lands" and whether those lands would be delineated as entitled to water under the Decree like "Green Lands" is also not clear under the MOU.

Perhaps more significantly, however, is the fact that the MOU proposes to "facilitate the resolution of pending order to show cause proceedings filed by SRP" in the Gila River Adjudication which sought to prevent certain Verde Ditch shareholders from using waters delivered from the Verde Ditch to their lands. *See* MOU at p. 1, ¶ E. To this end, once the MOU is entered into, the VDC (presumably on behalf of its shareholders) and any individual shareholder signing an HWR Agreement, must also agree that they: (1) will not contest the water rights and claims of SRP for SRP's lands located in the Phoenix metropolitan area,[11] which would include SRP's claims to all the remaining waters of the Verde River to use to fill the Horseshoe and Bartlett Reservoirs with priority dates of October 2, 1920 and December 23, 1921;[12] and (2) will not provide any financial or other assistance to any other person or entity in contesting the SRP's water rights and claims.[13]

Approval of the above described terms (that look more like a settlement in the Gila River Adjudication proceeding than in the *Hance v. Arnold* Decree) and/or that otherwise have nothing to do with the *Hance v. Arnold* Decree are well beyond the subject matter jurisdiction of this Court.

While the Yavapai County Superior Court is a Court of general jurisdiction, *see* A.R.S. § 12-123, because the Decree involves water rights to the Verde Ditch from the Verde River, the Court's subject matter jurisdiction in this case is limited to the management and enforcement of the Verde Ditch and the shareholders' rights to the Ditch under the *Hance v. Arnold Decree*. This is because since the enactment of Arizona's Water Rights Adjudication Statutes, A.R.S. § 45-251 *et seq*., all other matters related to the adjudication of water rights, including the rights of SRP and the individual shareholders who claim rights to the Verde River, are now under the exclusive jurisdiction[14] of the Gila River Adjudication Court.[15] *See Gabel v. Tatum*, 146 Ariz.

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[11] *See* MOU at p. 12, ¶ 12.3.

[12] The validity of SRP to obtain a Permit to Appropriate Water from the Arizona Department of Water Resources for Horseshoe and Bartlett Reservoirs with these priority dates is presently the subject of ongoing litigation. *See Paloma Irrigation and Drainage Dist., et. al v. Salt River Valley Water Users Association, et. al*, Case No. LC2014-000509-001 DT, Maricopa County Superior Court; *see also*, Administrative Appeal, In the Matter of the Decision of the Director to Grant the Salt River Valley Water Users' Associations' Amended Applications Nos. E-11, R-30, R-45, R46, R-71, R-72, A-135 and A-136 for Permits to Store and Beneficially Use Water on the Salt and Verde Rivers and Issue Permits Nos. 33-11, 33-97001, 33-97002, 33-97003, 33-97004 and 33-97005, Case No. 13A-SW001-DWR, *https://portal.azoah.com/oedf/documents/13A-SW001-DWR/index.html*

[13] *See Id.*

[14] The United States District Court for the District of Arizona also maintains concurrent jurisdiction to adjudicate the federal reserved water rights for Indian reservations and federal lands and enclaves within the state. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

[15] The water rights of the Yavapai-Apache Nation are prior perfected, vested property rights, though they have not yet been quantified. *See, e.g., In Re The General Adjudication of All Rights to Use Water In the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68, 71-72 (2001) (citing *Winters v. United States*,

527, 529, 707 P.2d 325, 327 (App. 1985) ("Subject matter jurisdiction abates when another county has already assumed jurisdiction in the same matter. While *In Re Salt River* is not the same action as the present case, it is inclusive of all issues raised in appellants' complaint." (internal citation omitted)); *see also* Ariz. Const. art. 6, § 14 ("[t]he superior court shall have original jurisdiction of: 1. Cases and proceedings in which exclusive jurisdiction is not vested by law in another court.").

Accordingly, while the resolution of litigation is generally favored, the Court simply cannot do what it is being asked to do by in the MOU even if it wanted to, since it lacks jurisdiction to approve a settlement involving rights to the Verde River among the parties or to otherwise adjudicate or confirm rights outside the four-corners of the *Hance v. Arnold* Decree. It is the Gila River Adjudication (and not this Court) that is the exclusive forum to "[d]etermine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and source . . ." A.R.S. § 45-257(B)(1).[16]

In addition to the foregoing, the MOU would also require that shareholders signing an HWR Agreement with SRP, agree (a) not to claim Historic Water Use for any other lands on the parcel in question (as the scope of that parcel is defined in the HWU Agreement) as against SRP in any Proceeding (presumably including the Gila River Adjudication); (b) not to sell, transfer or otherwise convey any VDC shares to another parcel unless such conveyance is made in conjunction with a severance and transfer performed pursuant to the procedures set forth in the MOU (including subject to SRP approval); and (c) not to expand any water use on the parcel except in conjunction with the acquisition of other water rights pursuant to the procedures set forth in the MOU. *Id.* at p. 10, ¶ 9.7.

Of course, these provisions of the MOU have the potential to impact not only the rights of the shareholders to the delivery of Verde River water from the Ditch, but also their rights to assert any additional claims to the Verde River for their parcels of land in the Gila River Adjudication proceedings. Again, approving such an agreement with SRP (as a non-party to the Decree) implicates the exclusive jurisdiction of the Gila River Adjudication Court and has the potential to impact the Ditch shareholders well-beyond the four-corners of the *Hance v. Arnold* Decree. The Court lacks jurisdiction to approve this scheme. *See Gabel*, 707 P.2d at 327.

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207 U.S. 564, 565-567 (1908)). The Nation's water rights are claimed in the Gila River Adjudication pursuant to Statement of Claimant Nos. 39-50059 (Yavapai-Apache Nation) and 39-54025 (United States on behalf of the Nation).

[16] *See also* A.R.S. § 45-251(2) (defining the "Gila adjudication" as "an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source."); *San Carlos Apache Tribe v. Superior Court,* 193 Ariz. at 205, 972 P.2d at 189 ("[T]he purpose of the adjudication is to quantify, prioritize, and document by decree existing priority rights to appropriable and federal reserved water."); *see also generally United States v. Superior Court*, 144 Ariz. 265, 697 P.2d 658 (1985) (discussing the purpose and scope of the Gila River Adjudication).

V. THE MOU FAILS TO TREAT THE *HANCE V. ARNOLD* AS A DECREE OF THE COURT, WHICH HAS SPECIFIC LEGAL CONSEQUENCE IN THE GILA RIVER ADJUDICATION PROCEEDING

Noticeably lacking from the proposed MOU is any recognition that the *Hance v. Arnold* Judgment and Decree entered on March 23, 1909, is, in fact, an actual Decree of the Court. This could have dangerous and adverse consequences to the Verde Ditch shareholders in the Gila River Adjudication, which is poised to determine the relative rights and priorities of all water users along the Verde River, including the shareholders in the Verde Ditch.

Arizona law requires the Gila River Adjudication Court to incorporate the *Hance v. Arnold* Decree (even where properly amended) into the Gila River Adjudication. *See* A.R.S. § 45-257(B)(1) ("...when rights to the use of water or dates of appropriation have been determined in a prior decree of a court, the [Adjudication] court shall accept the determination of such rights unless such rights have been abandoned.") [Emphasis added]. Should the Court determine that its prior Judgment and Decree is, in fact, not a "decree", the rights determined in *Hance v. Arnold* need not be "accepted" by the Adjudication Court, and thus, may be subject to challenge in the future.

While the *Hance v. Arnold* Decree did not expressly determine quantity or priority of appropriation, it did establish the right of the current Verde Ditch shareholders as successors-in-interest to the original landowners, to use water from the Verde River delivered by means of the Verde Ditch pursuant to their shares in the Ditch. The Court has retained jurisdiction to manage the Ditch and to determine who may rightfully use the waters delivered from the Verde Ditch by determining which lands owned by the successors-in-interest to the original landowners are entitled to receive such water. As such, this attribute, as determined by the Court, should ultimately be incorporated into the Gila River Adjudication as a prior decree under A.R.S. § 45-257(B)(1).

However, the MOU, as written, would expressly exclude such incorporation in the Adjudication. MOU at p. 11-12, ¶ 12.1 ("The *Hance v. Arnold* Court's approval of the Final Settlement Agreement will modify the existing judgment in *Hance v. Arnold* but shall not be deemed an adjudication of the water rights for any particular parcel of land that would otherwise be determined in the Adjudication.").

The Nation urges this Court to zealously protect its continuing jurisdiction over the *Hance v. Arnold* Decree and to reject terms in any MOU that would not otherwise define the *Hance v. Arnold* Decree as a "decree" within the meaning of A.R.S. § 45-257(B)(1) or which could be used to prevent any further clarification of the Decree under the Court's continuing jurisdiction from being incorporated into the Adjudication as a prior decree.

VI. THE VERDE DITCH'S HISTORICAL WATER SALES AND THE INAPPLICABILITY OF CURRENT SEVERANCE AND TRANSFER LAWS RAISES CONCERNS

According to the Verde Ditch Company's Statement of Claimant filed in the Gila River Adjudication, Claim No. 39-50029 ("SOC") on behalf of the shareholders, the Verde Ditch is one of the oldest currently operating irrigation ditches in the State of Arizona with the first use of water reported to be in 1868, when Arizona was only a Territory.

After the first use of water from the Ditch in 1868, five individuals constructed what was known as the "Old" Verde Ditch in 1873. *Id.* Thereafter, in 1891, three additional individuals filed a location notice in Yavapai County for the "New" Verde Ditch. *Id.*

At the time of the purported original appropriations of water from the Verde River to be conveyed through the Verde Ditch, the law of the Territory of Arizona, which governed the operation of acequias, or irrigating canals (the "Howell Code"), required that prior existing rights to the use of the canals not be disturbed by the new code. The laws also confirmed that any person installing a ditch or acequia also had an exclusive right to the water necessary for agricultural purposes. Specifically, the Howell Code of 1864 provided in relevant part:

> § 2 All rights in acequias, or irrigating canals, heretofore established shall not be disturbed, nor shall the course of such acequias be changed without the consent of the proprietors of such established rights.
>
> § 3 All the inhabitants of this Territory, who own or posses arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek, or stream of running water.
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> § 7 When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water, or so much thereof as shall be necessary for said purposes...
>
> § 13 Immediately after the publication of this chapter, it shall be the duty of the several justices of the peace in this Territory to call together in their respective precincts all the owners and proprietors of lands irrigated by any public acequia, for the purpose of electing one or more overseers for said acequia for the corresponding year.

Howell Code c. LV, §§ 2, 3, 7, 13 (1864).

At the time the *Hance v. Arnold* case was brought before the Yavapai County Superior Court on the Complaint filed by George Hance in 1907, the above noted provisions of the Howell Code were substantially unchanged.

None of the laws in effect when the original appropriations of water were made for conveyance through the Verde Ditch contained any formal requirement for how water delivered from the Ditch might be severed from the land upon which it was beneficially used and

transferred for use on other lands. As such, the severance and transfer of water used from the Ditch would have been governed by common law during this time.

Notably, the *Hance v. Arnold* Decree in Article VI also expressly contemplated sales (and thereby severances and transfers) of water that might be delivered from the Ditch:

> That the proceeds arising from sales of water should be by the purchasers paid over to the ditch company, and the ditch company in turn account to the owner or owners of the interests upon whose account or accounts such sales shall be made, first charging said interest or interests with it or their share of the cost of repair and maintenance of the ditch.

Evidence in the Court's *Hance v. Arnold* files indicates that water sales indeed occurred. For instance, the Ditch Commissioner, E.W. Monroe, filed an Application on July 13, 1910, at p. 2, stating the following:

> That during the deponent's term of office, as had been done for a number of years prior thereto, the ditch company sold one hundred inches of water for $300 which was applied and credited to the account of said [George] Hance with the ditch company; and an additional fifteen inches of water were sold during said period, and said Hance credited with one-fifth of the proceeds thereof, all of which was in accordance with the custom which had been in force among the owners in said ditch for a number of years.
>
> The in the latter part of 1909, said Hance told deponent in substance that he would not permit the ditch company to continue to sell water for his account, for the reason that he claimed the ditch company would not give him the proceeds, and that thereafter he would handle and sell the water himself and collect the proceeds.

The foregoing Affidavit by E.W. Monroe is only one instance of water sales referenced in the Court's *Hance v. Arnold* file but there are likely other instances of water sales that occurred during this early period.

It was not until 1919, (10 years after *Hance v. Arnold* and 7 years after Arizona statehood) that any formal legal requirements were generally imposed for severance and transfer of water rights to other lands:

Laws 1919, Ch. 164, § 48:

> § 48 All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; provided, that if for any natural cause beyond control of the owners it should at any time become impracticable to be [sic] beneficially or economically use water for irrigation of any land to which water is appurtenant, said right may be severed from said land, and simultaneously

> transferred and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Commissioner. Before the approval of such transfer an inspection shall be made by the Commissioner or persons deputized by him, and the Commissioner shall approve or disapprove such transfer and prescribe the conditions therefor. Such order shall be subject to appeal as in this act provided. [emphasis added].

The importance of the history of water sales (in other words, historical severances and transfers) in determining which lands are entitled to water to be delivered from the Verde Ditch cannot be understated. The *Hance v. Arnold* Court has retained continuing jurisdiction to regulate water use from the Verde Ditch, and with that jurisdiction comes the authority and responsibility to ensure that only the proper parties are using the water delivered from the Ditch in proper proportion.

Although the VDC and SRP informed the shareholders at the January 24, 2015 Special Meeting that they have been working together to determine "historical water use" from the Ditch, there was no indication that any analysis of the original lands to which the water from the Ditch was appurtenant as traced in title from the original owners under the *Hance v. Arnold* Decree has been undertaken, nor was there any indication that the VDC has reviewed its records to account for any water sales and transfers. This work would be necessary for the Court to create an accurate and complete map of those lands that are actually included within the original framework of the Decree.

In addition to the foregoing, it should also be noted that the MOU, as written, appears to wrongfully assume that all historical severances and transfers of Verde Ditch rights must be approved by SRP as a downstream irrigation district under current Arizona law. *See* MOU at p. 8, ¶ 8.3.

While it is true that A.R.S. § 45-172(A)(5) presently requires approval from the downstream irrigation district (in this case, SRP) for a severance and transfer to be submitted to the Arizona Department of Water Resources ("ADWR") for approval,[17] it is questionable if such approval by SRP or ADWR is even required for Verde Ditch shareholders who are currently under the jurisdiction of the *Hance v. Arnold* Court for administration of the Decree.

Pursuant to historic, as well as current Arizona law, A.R.S. § 45-103(B), the Director of ADWR does not supervise the distribution of surface water under the Arizona Water Code (Title 45) where such distribution has otherwise been reserved under existing judgments or decrees. *Id.* ("The director has general control and supervision of surface water, its appropriation and

[17] *See* A.R.S. § 45-172(A)(5) ("No right to the use of water on or from any watershed or drainage area which supplies or contributes water for the irrigation of lands within an irrigation district, agricultural improvement district or water users' association shall be severed or transferred without the consent of the governing body of such irrigation district, agricultural improvement district or water users' association.").

distribution, and of groundwater to the extent provided by this title, except distribution of water reserved to special officers appointed by courts under existing judgments or decrees.").[18] Should this provision apply to this case, then the Director would not have the authority to require review or approval of severances and transfers which are already under the *Hance v. Arnold* Court's jurisdiction.

Whether or not the severance and transfer process under the current provisions of A.R.S. § 45-172 (requiring SRP and ADWR approval) is required where the Court has already retained its continuing jurisdiction to administer and enforce the *Hance v. Arnold* Decree has yet to be decided by this Court.[19] Indeed, the provision of A.R.S. § 45-172(A)(5), which now requires approval of severances and transfers from a downstream irrigation district (thereby giving entities like SRP a "veto" power over such severances and transfers) was not enacted into law until 1962,[20] almost 100 years after the waters of the Verde River were first appropriated for the Verde Ditch and well after the Court took jurisdiction over the management of the deliveries of water from the Verde Ditch in *Hance v. Arnold* in 1909.[21] Thus, it would seem that this legal issue should be fully briefed and carefully considered by the Court prior to presuming that the process outlined in the MOU is valid and required by law.

VII. THE SHAREHOLDERS AND THE NATION HAVE PAID THE SPECIAL ASSESSMENT SINCE 2005 TO FUND THE RESEARCH AND ANALYSIS TO SUPPORT THE SHAREHOLDERS' RIGHTS TO THE USE OF VERDE RIVER WATERS DELIVERED FROM THE VERDE DITCH

On September 23, 2005, the Verde Ditch Commissioners, filed an *ex parte* petition with the Court to impose a Special Assessment on the Verde Ditch Shareholders of $50 per share annually, "to engage surveyors, title companies, cartographers, accountants, hydrologists,

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[18] The 1919 Arizona Water Code, which was the first law to require approval of the State Water Commissioner for severances and transfers, also contained a similar provision to the one existing in A.R.S. § 45-103(B) today: "The Commissioner shall have general control and supervision of the waters of the State of Arizona and of the appropriation and of the distribution thereof, excepting such distribution as is hereinafter reserved to Water Commissioners appointed by the courts under existing decrees."). Laws 1919, Ch. 164 at § 2.

[20] *See* Laws 1962, Ch. 113, § 45-172.

[21] In addition, A.R.S. § 45-171 also specifically provides:

> Nothing in this chapter shall impair vested rights to the use of water, affect relative priorities to the use of water determined by a judgment or decree of a court, or impair the right to acquire property by the exercise of the right of eminent domain when conferred by law. The right to take and use water shall not be impaired or affected by the provisions of this chapter when appropriations have been initiated under and in compliance with prior existing laws and the appropriators have in good faith and in compliance with such laws commenced the construction of works for application of the water so appropriated to a beneficial use and prosecuted the work diligently and continuously, but the rights shall be adjudicated as provided in this chapter. [Emphasis added].

researchers, and attorneys as deemed necessary in the ongoing project to develop, examine and document the historical and present use of Verde River water delivered to the Verde Ditch shareholders under and pursuant to the 1909 Hance v. Arnold decree." *See* Petition for Authorization and Approval of a Special Assessment (*Ex Parte*), filed September 23, 2005 ("*Ex Parte* Petition").

On the same date of the filing, September 23, 2005, the Court entered its Order for Authorization and Approval of a Special Assessment (*Ex Parte*) ("Special Assessment Order"), "[a]uthorizing the expenditure of these special assessment funds only for the express purposes stated in the *ex parte* Petition filed by the Commissioners." *See id.* at p. 2, ¶ 3.

Thereafter, on September 26, 2005, the Verde Ditch Commissioners sent a letter to the shareholders stating the following:

> As you know, we are in an on going adjudication of water rights, which affects every shareholder and property owner served by the Verde Ditch. In order to continue the necessary work to document the Verde Ditch uses, past and present, additional funding is necessary as requested by the commissioners. The Yavapai County Superior Court has approved a special assessment to meet the estimated costs and expenses to engage surveyors, title companies, cartographers, accountants, hydrologists, researchers, and attorneys as deemed necessary in the ongoing project, to develop, examine and document the historical and present use of the Verde River water delivered to the Verde Ditch shareholders under and pursuant to the 1909 Hance v Arnold decree. The existing maintenance and operational budget of the Verde Ditch is simply not sufficient to cover the additional costs to protect our water rights. We believe that the work performed will require months, if not years, of continuing effort and that in the end, the information will be vital to protect and preserve the rights of the Verde Ditch shareholders in the ground streams adjudication. The information, once compiled, will be available to all shareholders for review. It is the intent and desires of the Verde Ditch to be able to extinguish or reduce the assessment, once it is no longer needed, but as you can imagine, there is extensive work required since the Verde Ditch began operation over 137 years ago. [Emphasis added].

The Yavapai-Apache Nation (along with every other shareholder) has paid the Special Assessment since its inception in 2005.[22] Now that the MOU has been proposed, it has become clear that at least some of the information being collected by the VDC (which was paid for by the Nation and the other shareholders) has likely been shared with SRP, a non-party to the *Hance v. Arnold* Decree and used in negotiating the proposed MOU. The Nation is not aware if the VDC obtained prior permission from the Court to share the shareholders' information with SRP as part of these negotiations or not. In any event, whether the Court has jurisdiction to authorize the

[22] The 2005 Special Assessment was assessed at $50 per share, but was held in abeyance in 2006 and 2007, and then reinstituted at $25 per share beginning in 2008.

sharing of the shareholder information within VDC's possession with a non-party to the Decree for purposes of settling matters that (for the most part) relate to the Gila River Adjudication and not *Hance v. Arnold*, is a questionable proposition at best.

Additionally, even though Verde Ditch Commissioners committed in the 2005 VDC letter that "[t]he information, once compiled, will be available to all shareholders for review," (emphasis added), during the January 24, 2015, Shareholder Meeting to discuss the MOU, the VDC did not offer to make the compiled information available to shareholders, but rather explained that as part of the MOU process, the VDC and SRP would set up individual meetings with each shareholder in order to review with that shareholder the information in their possession relative to that shareholder's lands only. The secrecy and control of the information by SRP and the VDC is contrary to the Verde Ditch Commissioners' role as officers of the Court and it fails to comport with fundamental elements of due process in addressing matters under the *Hance v. Arnold* Decree. The information gathered by the VDC as part of the Special Assessment or otherwise relied upon by the VDC and SRP to develop the MOU should be made available to any interested shareholder.

VIII. APPROVAL OF THE MOU IS NOT REQUIRED FOR THE COURT TO ENFORCE THE TERMS OF THE *HANCE V. ARNOLD* DECREE

As noted earlier, the Nation supports the Verde Ditch Commissioners' goal to resolve concerns related to determining the specific rights of the various shareholders to use water from the Ditch, which is wholly within the Court's original and continuing jurisdiction under the *Hance v. Arnold* Decree. Resolving such matters would provide certainty to the shareholders and confirm and protect the shareholders' vested property rights to the delivery of water from the Ditch for use on certain lands. This is permitted under existing law. *See, e.g., Taylor*, 21 Ariz. at 581-582 (holding that the *Hurley v. Abbott* court has the power and authority to confirm or enforce the Kent Decree under its original jurisdiction). Once the Court resolves these concerns, the rights of the shareholders should ultimately be incorporated into the Gila River Adjudication proceedings pursuant to A.R.S. 45-257(B)(1).

The Nation also appreciates the Verde Ditch Commissioners' goal to "facilitate the resolution of pending order to show cause proceedings filed by SRP [in the Gila River Adjudication]", *see* MOU at p. 1, ¶ E, through which SRP has sought to prevent certain Verde Ditch shareholders from using waters delivered from the Verde Ditch to their lands. However, while this goal is also laudable, it simply cannot be achieved in this proceeding, since such an action is well beyond the Court's jurisdiction under the *Hance v. Arnold* Decree. *See* Section IV, *supra*.

With this said, the Nation agrees with the Verde Ditch Commissioners that the time has come for the Court to conduct a wholesale review of the rights first delineated in the Decree in order to explicitly determine and delineate the lands and rights of legitimate shareholders to the Ditch, which may now total more than 500 shareholders. Indeed, any shareholder on the Ditch, and even the Verde Ditch Commissioners themselves, could petition the Court to undertake this effort. This has been done in the past in this proceeding and such an action is contemplated by the Order Promulgating New Rules and Regulations for the Operation of the Verde Ditch dated

August 9, 1989. This would not result in a modification of the Decree, but rather, the enforcement of existing rights under the Decree.

Moreover, pursuant to the Order of the Court dated September 23, 2005, the VDC has collected the Special Assessment, to allow the VDC "to develop, examine and document the historical and present use of the Verde River water delivered to the Verde Ditch shareholders under and pursuant to the 1909 *Hance v. Arnold* decree." With the information developed using the Special Assessment, the VDC should be well-prepared to assist the Court in completing the above described task in order to clarify the current lands and rights of the shareholders to the Verde Ditch.

As part of this process, the Court could allow shareholders who may not be in compliance with their usage rights to seek alternative resolutions, such as through the severance and transfer process in order to address those rights. Depending on the Court's determination if severances and transfers must follow the current statutory process of A.R.S. § 45-172(A)(5), shareholders may even consider entering into third party agreements (such as the HWR Agreements with SRP) to resolve concerns presented by the severance and transfer. Once completed and approved under applicable law, the shareholder could still present their severances and transfers to the Court for consideration. But the Court lacks jurisdiction to require or approve any HWR Agreements entered into with SRP or to modify its Decree to incorporate these Agreements, since any action of this type is beyond the limited and retained jurisdiction of this Court. *See* Section IV, *supra.*

IX. CONCLUSION

In the end, there is a "right way" and a "wrong way" to address the foundational concerns that many of the shareholders have regarding the efforts of SRP to challenge the shareholders' Verde Ditch rights. If shareholders want to enter into individual agreements with SRP, that is wholly within their prerogative. However, those agreements cannot impact the vested rights of the remaining shareholders under *Hance v. Arnold,* which is under the Court's continuing jurisdiction.

The *Hance v. Arnold* Court has the opportunity and indeed, the responsibility under its own continuing jurisdiction, to clarify the rights of the shareholders in a process that would involve all shareholders and that would ultimately be incorporated into the Gila River Adjudication, without the involvement of any non-parties to the Decree. Such a clarification would go a long way to settling the rights of the parties under *Hance v. Arnold* without requiring the shareholders to waive their rights as to SRP in the Gila River Adjudication.

The Nation is supportive of a Court-driven process to enforce the *Hance v. Arnold* Decree through a process that would be open, transparent and fair to all shareholders, including the US for the benefit of the Nation.

For the reasons expressed in this letter, the Nation respectfully requests that the approval of the proposed MOU be denied and it seeks all other requested relief as outlined in this letter.

Yours Truly,

YAVAPAI-APACHE NATION

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